LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-397

H. O. FORGY, III,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Tennessee

R. A. ASHLEY, JR.
Attorney General of Tennessee
414 Supreme Court Building
Nashville, Tennessee 37219

ROBERT H. ROBERTS
Assistant Attorney General
414 Supreme Court Building
Nashville, Tennessee 37219

Attorneys for Respondent

HENRY V. SUTTON
Suite 2904
100 North Main Building
Memphis, Tennessee 38103

KEMPER B. DURAND
Suite 1105
Union Planters Bank Building
Memphis, Tennessee 38103

Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Prayer	1
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions involved	3
Statement of the case	4
Reasons for allowance of writ	14
First issue	14
Second issue	18
Conclusion	23
Certificate of service	24
Appendix A—Opinion of Court of Criminal Appeals of Tennessee	A-1
Appendix B—Order of the Supreme Court of Tennessee	A-10
Appendix C—Denial of petition for writ	A-11
Appendix D—Order granting stay of execution	A-12

Cases Cited

AZ Din v. United States (9th Cir. 1956), 232 F2d 283, cert. denied 77 S.Ct. 39, 352 U.S. 827	15
Berger v. United States (1935), 295 U.S. 78, 55 S.Ct. 629	14

Bolin v. State (1971), — Tenn.Cr.App. —, 472 S.W.2d 232 16

Burlison v. State (1973), — Tenn. —, 501 S.W.2d 801 .. 16

Casone v. State (1952), 193 Tenn. 303, 246 S.W.2d 22 .. 19

Clapp v. State (1895), 94 Tenn. 186, 30 S.W. 214 ..18, 19

Collins v. State (1935), 169 Tenn. 393, 88 S.W.2d 452 18

Elliott v. State (1922), 92 Tex. Crim. 571, 244 S.W.2d 1007 20

Frost v. Corporation Commission of State of Oklahoma (1929), 278 U.S. 515, 49 S.Ct. 235 21

Gomez v. Perez (1973), 409 U.S. 535, 93 S.Ct. 872 22

Grindstaff v. State (1964), 214 Tenn. 58, 377 S.W.2d 921 19

Hall v. United States (1893), 150 U.S. 76, 14 S.Ct. 22 ..15, 17

Halquist v. State (1972), — Tenn. Cr. App. —, 489 S.W. 2d 88 20

Hicks v. State (1912), 126 Tenn. 359, 149 S.W. 1055 .. 18

Hill v. Texas (1942), 316 U.S. 400, 62 S.Ct. 1159 21

Hiller v. State (1932), 164 Tenn. 388, 50 S.W.2d 225 .. 17

Hurt v. State (1947), 184 Tenn. 608, 201 S.W.2d 988 .. 19

Kinchelow v. State (1844), 24 Tenn. 9, 5 Hump 1 18

Levy v. Louisiana (1968), 391 U.S. 68, 88 S.Ct. 1509 .. 22

Louisville Gas & Electric Company v. Coleman (1928), 277 U.S. 32, 48 S.Ct. 423 21

Manning v. State (1953), 195 Tenn. 94, 257 S.W.2d 6 .. 16

Moore v. State (1968), 1 Tenn. Cr. App. 190, 432 S.W.2d 684 .....18, 19

Norman Williams v. United States (6th Cir. 1970), 422 F.2d 1043, cert. denied 91 S.Ct. 380, 400 U.S. 967 .. 16

Pietch v. United States (10th Cir. 1940), 110 F2d 817, cert. denied 60 S.Ct. 1100, 310 U.S. 648 15

Remus v. United States (6th Cir. 1924), 291 F. 501, cert. denied 44 S.Ct. 180, 263 U.S. 717 15

Ripley v. State (1950), 189 Tenn. 681, 227 S.W. 2d 26 .. 18

Robinson & Jones v. State (1855), 84 Tenn. 146, 16 Lea 123 18

Roland v. State (1917), 137 Tenn. 663, 194 S.W. 1097 17

San Antonio Independent School District v. Rodriguez (1973), 411 U.S. 1, 93 S.Ct. 1278 22

Scott v. State (1960), 207 Tenn. 151, 338 S.W.2d 581 .. 19

Shelly v. State (1895), 95 Tenn. 152, 31 S.W. 492 19

Sheril v. State (1959), 204 Tenn. 437, 321 S.W.2d 811 ..18, 19

Skuy v. United States (8th Cir. 1919), 261 F. 316 16

Smartt et al. v. State (1904), 112 Tenn. 539, 80 S.W. 586 18

South Carolina ex rel. Phoenix Mutual Life Insurance Co. v. McMaster (1915), 237 U.S. 63, 35 S.Ct. 504 21

State v. Lawlor (1881), 28 Minn. 216, 9 N.W. 698 19

Underwood v. State (1971), — Tenn. Cr. App. —, 465 S.W.2d 884 19

United States v. Allison (5th Cir. 1973), 474 F2d 286 15

United States v. Cruikshank (1875), 92 U.S. 542 21

United States ex rel. Haynes v. McKendrick (2nd Cir. 1973), 481 F2d 152 16

United States v. Grey (6th Cir. 1970), 422 F2d 1043 ..16, 17

United States v. Grunberger (2nd Cir. 1970), 431 F2d 1062 16

United States v. Lamerson (5th Cir. 1972), 457 F2d 371 .. 16

Vines v. State (1950), 190 Tenn. 644, 231 S.W.2d 322 ..16

Williams v. United States (1897), 168 U.S. 382, 18 S.Ct. 92 15

Statutes Cited

28 U.S.C. § 1257(3) 2

52 T.C.A. § 1413 4

52 T.C.A. § 1432 4

Tennessee Code Annotated, § 6-609 20

Text Cited

Wharton's Criminal Evidence, 13th Ed., Vol. 2 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. .....

H. O. FORGY, III,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Tennessee

Henry V. Sutton and Kemper B. Durand, retained counsel for Petitioner, H. O. Forgy, III, pray that a Writ of Certiorari issue to review the judgment by the Tennessee Supreme Court entered in the above cause on July 15, 1974 and August 12, 1974.

OPINIONS BELOW

The Court of Criminal Appeals of Tennessee at Jackson, wrote an Opinion in this cause, which was styled *H. O. Forgy, III vs. State of Tennessee*, No. 13 Madison Criminal, which was

filed on February 13, 1974, and being unpublished, a copy of said Opinion is appended hereto. Petitioner's application for a Writ of Certiorari before the Tennessee Supreme Court was denied July 15, 1974, together with his Motion to Strike and Expunge From the Record, and no Opinion was written by the Court, and a copy of the order evidencing said denial is appended hereto. Petitioner's Motion to Reconsider Petition for Certiorari was denied August 12, 1974, with no written Opinion, and a copy of the denial is appended hereto.

JURISDICTION

The judgment of the Supreme Court of Tennessee was made and entered on July 15, 1974 and August 12, 1974. The jurisdiction of this Court is invoked under Title 28 *U.S.C.* § 1257(3) providing review by the Supreme Court of the United States of America by Writ of Certiorari where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Were Petitioner's constitutional rights to due process and/or equal protection of the law violated by the Trial Court's allowing the State's Attorney to inject racial and social prejudices into the trial through questioning of Petitioner and other witnesses?

2. Were Petitioner's constitutional rights to due process and/or equal protection of the law violated by allowing the conviction to be sustained on the uncorroborated testimony of an accomplice when Tennessee law clearly states that the uncorroborated testimony of an accomplice is not sufficient to sustain a conviction?

CONSTITUTIONAL PROVISIONS INVOLVED

"*Amendment 5*

"*Criminal Actions—Provisions concerning—Due process of law and just compensation clauses.*—No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"*Amendment 6*

"*Criminal Actions—Right to be informed.*—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

"*Amendment 14*

"*Section 1. Citizenship—Due process of law—Equal protection.*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

H. O. Forgy, III, Petitioner in this case seeks review of the Tennessee Supreme Court's affirmation of his conviction for the sale of heroin (52 *T.C.A.* § 1413) and subsequent five (5) year penitentiary sentence (52 *T.C.A.* § 1432). Petitioner was indicted in Madison County, Tennessee for allegedly selling a controlled substance, heroin, to a Jackson, Tennessee police officer who testified he purchased the substance in question at Mr. Forgy's home five or six miles outside the jurisdictional and city limits of Jackson, Madison County, Tennessee. (R. 35, 51, 52). The State alleged that Mr. Forgy had violated *T.C.A.* § 52-1432, by selling a quantity of heroin to one Shaw. (R. 3). The jury found him guilty of selling heroin and sentenced him to five (5) years in the penitentiary. Mr. Forgy timely filed his Motion for New Trial. The motion was overruled by the Trial Court, and Mr. Forgy proceeded to perfect his appeal to the Court of Criminal Appeals sitting at Jackson, Tennessee, where the judgment of the Trial Court was affirmed in an unpublished Opinion filed February 13, 1974. (R. 10-20, 22, 23).

Petitioner made an application to the Supreme Court of Tennessee for a Petition for Writ of Certiorari to the Court of Criminal Appeals of Tennessee and said petition was denied by the Supreme Court of Tennessee on July 15, 1974 with no written opinion. Petitioner filed a Petition to Reconsider Petition for Certiorari, which was denied by the Supreme Court of Tennessee on August 12, 1974 with no written opinion. Petitioner

requested and was granted by the Tennessee Court of Criminal Appeals a Motion to Stay Execution of Judgment Pending Certiorari on September 10, 1974.

The trial of this case was a matter of direct conflict of testimony between Petitioner, H. O. Forgy, III, and his witness, Jimmy Patterson, on the one hand and the testimony of State's witness, Shaw, on the other hand. (R. 93-115, 115-144, 32-64).

Mr. Forgy and Mr. Patterson directly contradicted the testimony of Shaw concerning the alleged sale of heroin, the *corpus delicti*. (R. 93-115, 115-144, 32-64). No witness corroborated Shaw's testimony concerning the *corpus delicti*. (Entire Record). During the trial, therefore, the entirety of the State's proof concerning the *corpus delicti*, or the alleged sale of heroin, was solely by the witness, Shaw. (Entire Record, R. 32-64).

Three other witnesses testified for the State: Sgt. Moore, who was Shaw's superior on the police force (R. 66-67); Officer Anderson, who took the substance to the Department of Public Health Toxicology Laboratory in Nashville (R. 67-68); and Mr. Freeze, who was an employee of the Department of Toxicology. (R. 80). None of these witnesses added any facts concerning the alleged sale of heroin to Shaw. (R. 66-67, 67-68, 80).

Shaw testified he was an employee of the Jackson, Tennessee Police Department and that he had worked four or five months investigating narcotics cases. (R. 32). By Shaw's account, he was directed to Mr. Forgy's trailer in the ". . . Robin's Trailer Court outside the city limits of Jackson" by a man named, Buck Brown. (R. 34, 35). Shaw testified that he and Brown went in Shaw's automobile to Mr. Forgy's trailer, arriving at approximately 10:00 p.m., finding Mr. Forgy, Jimmy Patterson, and two other unknown individuals present in the trailer. (R. 36-39). Shaw said he had made no attempt to bring the other two people to court as witnesses or to learn their identity. (R. 58, 59).

Shaw's version of the alleged offense was that once in the trailer Brown and Shaw accompanied Mr. Forgy to the back of the trailer where Mr. Forgy removed four aluminum foil packets from some unknown place and gave one to Brown and one to Shaw. (R. 39). Shaw said he told Mr. Forgy he did not have money to pay for the packet, but that he could give Mr. Forgy his wrist watch (a Timex electric), (R. 47), which he would redeem the next day with money at Mr. Forgy's father's warehouse. (R. 39, 40).

Thereafter, Shaw testified they went to the front room where, he said, Mr. Patterson, Mr. Forgy, and Brown prepared "this substance in a spoon and with some liquid substance they heated the spoon and took this substance and injected it into a needle and injected this substance into their arms." (R. 40). Shaw said he put the substance he bought in his pocket (R. 40) and later put it in the medicine bottle or vial, (Ex. 4), which he put in an envelope, (Ex. 1), which envelope was turned over to Moore on December 10, 1971, two days later. (R. 42, 43, 45, 46).

Shaw said he and Brown stayed at the trailer until 11:00 p.m. or 11:30 p.m., and that he then took Brown home and went home himself. (R. 40). The next day, Shaw testified, he met Mr. Forgy in Jackson at the H. O. Forgy Warehouse on Chester Street, and Shaw then told Mr. Forgy he had come for his watch, and that he had the money he had promised Mr. Forgy. (R. 49). Earlier, he had testified that he told Mr. Forgy he would redeem his watch for $20.00—$10.00 for Brown's packet and $10.00 for Shaw's packet. (R. 41).

Under cross-examination, Shaw testified that he was employed by Chief Harvey Marcom of the Jackson Police Department on October 15, 1971 (R. 50) before this alleged offense took place on December 8, 1971. He also testified that, as a member of the Jackson Police Department, his jurisdiction was limited to the city limits of Jackson (R. 51, 52), and that Mr. Forgy's trailer in the Robin's Trailer Court on Steam Mill

Ferry Road was in the Maddison Hall community, five or six miles outside the city limits of Jackson. (R. 52). He further stated that Mr. Forgy's case was the only one he had ever investigated outside the city limits of Jackson. (R. 53).

Shaw admitted, also under cross-examination, that he lied to Mr. Forgy when he allegedly obtained the packet from him in telling Mr. Forgy he had no money. (R. 56). He said he intended to go to Mr. Forgy's house to make a purchase, but that he lied to Mr. Forgy about the money, because he realized he was outside the city limits and decided to "consummate the deal inside the city limits" by offering his wrist watch for collateral. (R. 56).

It should be realized that, in addition to the facts concerning the issue of a conviction based solely on the uncorroborated testimony of an accomplice, the Attorney General sought and received answers to questions about the appearance of Mr. Forgy at the time Shaw observed him and the relationships of Mr. Forgy and Mr. Patterson with black persons.

Just before the conclusion of Shaw's testimony the following appears in the Record from page 48, question 166, through page 49, question 120, and the answers following those questions:

> Q. 116 Let me ask you this at the time of this transaction the night before and out there on the parking lot was the defendant's appearance the same or had there been any change?
>
> A. Yes, sir, it is.
>
> Q. 117 What is the change?
>
> MR. DAVIS: I object to that, if the Court please, he may have had a bath out there at that time and may have been washed up——

THE COURT: Overruled, Mr. Davis. You may ask the question. Proceed.

Q. 118 What was the change?

MR. DAVIS: Note an exception.

THE COURT: So noted.

A. At this time, Mr. Forgy, at that time he had a beard, a longer mustache, and longer hair. Possibly, I believe, it was shoulder length.

Q. 119 Let me ask you this question.

MR. DAVIS: This has nothing at all to do with the guilt or innocence of this man.

THE COURT: The State has a right to put their case on, Mr. Davis. At this point, I can't say that. I don't know. He may answer the question.

Q. 120 Do you have any questions in your mind that even though you know there was a change as to the identity of this young man?

A. No, sir, I don't.

On redirect examination, the Attorney General elicited testimony from Shaw that Brown was a black man and that Mr. Forgy (a white man) and Brown appeared to know each other "very well." (R.64).

The State was discussing Patterson's occupation with the defendant on cross-examination. In an attempt to discredit the credibility of Patterson and to leave the impression with the jury that the trailer was the center of drug selling, the Prosecutor asked the defendant:

Q. 50. What was Patterson's occupation for a living?

A. He was a carpenter.

Q. 51. Who was he working for?

A. I don't know.

Q. 52. Why did you say he was a carpenter. Did you see him do any carpenter work?

A. Yes.

Q. 53. Where and for who?

A. I don't know who for. I don't know. I know he was a carpenter.

Q. 54. *Well the truth of it he was just in the narcotics business, wasn't he? Did you know that?*

A. No, sir, I don't think he was.

Q. 55. Sir?

A. No, I don't think he was.

TR. p. 75
(emphasis added)

Thereafter, upon cross-examination of Patterson, the State asked:

Q. 99. For what purpose would you and he (Buck Brown) make a trip to Memphis together for?

A. Just to get out of town.

Q. 100. Did anyone else ever go along with you?

A. Usually just Buck and myself.

Q. 101. *Isn't it the trath that you and Buck were going over there and picking up some kind of drugs and narcotics and come back over here and sell them? Isn't that the truth of the matter?*

A. No, sir, that is not the truth.

TR. p. 100
(emphasis added)

Apparently not satisfied with this answer, the State asked this witness numerous questions about his trip to Memphis, including these:

Q. 114. Did you go any particular place?

A. Several places.

Q. 115. South Highland Strip is in the vicinity of Memphis City area, isn't it?

A. Yes, it is.

Q. 116. Did you go in any places in that area?

A. Yes.

Q. 117. For what purpose did you go?

A. To have something to do.

Q. 118. What did you do?

A. Shot pool. Visited personal friends that I knew.

Q. 119. *Well, don't you know that South Highland Strip is a known drug area there in Memphis?*

A. I would say that any particular area could be called a known drug area.

Q. 120. *South Highland Avenue, that has the reputation of being the drug area.*

A. Only because it is around the college campus.

TR. p. 102
(emphasis added)

While cross-examining Mr. Patterson, the Attorney General injected the issue of race into the case by asking, "Did you make any trips from Memphis with any other colored boys other than Buck Brown?" (R. 133). The Attorney General had earlier asked Mr. Patterson about taking two or three trips to Memphis with Mr. Brown. (R. 130-133). The Attorney General had also

pointed out earlier that Buck Brown was a friend of Mr. Forgy's; that Brown visited in Mr. Forgy's home before; and that Brown had been in the courtroom earlier. (R. 101-102).

Again, the Attorney General injected the issue of race into the case while he was cross-examining Mr. Patterson when he asked, "Weren't you there one night when you met Buzz Shaw, you and another colored girl and also Moose Hannah?" (R. 137). The Attorney General further asked, "Did you ever go there in the company of a colored girl?" and "Did you ever keep company with one while down there?" (R. 137).

After the State's evidence was concluded (R. 92), Mr. Forgy's attorney moved for a directed verdict, which motion the Court overruled. (R. 93). Thereafter, Mr. Forgy took the stand in his own defense. (R. 93).

H. O. Forgy, III testified that he was single (R. 99); that he was 24 years old; that his father was H. O. Forgy, Jr.; that he had graduated from Jackson High School; that he went into the United States Army in July, 1968 and was honorably discharged in July, 1970, having served in Germany eighteen months; that he was presently in the active reserves (R. 93, 94); and that he had worked for H. O. Forgy & Son making approximately $100.00 per week at the time Shaw visited him. (R. 99).

Mr. Forgy testified that he was not guilty of selling heroin. (R. 94, 95). He said Shaw did come to his home once during the last year with Buck Brown, but did not remember the date. (R. 95). He also said it was in the afternoon when they came, at 5:30 p.m. or 6:00 p.m., and that it was still light outside, because he looked out of his window and saw Shaw's new automobile. (R. 95, 96).

When Shaw visited him, Mr. Forgy testified, only Jimmy Patterson, Shaw, Brown, and he (Mr. Forgy) were present. (R. 96). He also said that while Shaw was there no one went

Apparently not satisfied with this answer, the State asked this witness numerous questions about his trip to Memphis, including these:

Q. 114. Did you go any particular place?

A. Several places.

Q. 115. South Highland Strip is in the vicinity of Memphis City area, isn't it?

A. Yes, it is.

Q. 116. Did you go in any places in that area?

A. Yes.

Q. 117. For what purpose did you go?

A. To have something to do.

Q. 118. What did you do?

A. Shot pool. Visited personal friends that I knew.

Q. 119. *Well, don't you know that South Highland Strip is a known drug area there in Memphis?*

A. I would say that any particular area could be called a known drug area.

Q. 120. *South Highland Avenue, that has the reputation of being the drug area.*

A. Only because it is around the college campus.

TR. p. 102
(emphasis added)

While cross-examining Mr. Patterson, the Attorney General injected the issue of race into the case by asking, "Did you make any trips from Memphis with any other colored boys other than Buck Brown?" (R. 133). The Attorney General had earlier asked Mr. Patterson about taking two or three trips to Memphis with Mr. Brown. (R. 130-133). The Attorney General had also

pointed out earlier that Buck Brown was a friend of Mr. Forgy's; that Brown visited in Mr. Forgy's home before; and that Brown had been in the courtroom earlier. (R. 101-102).

Again, the Attorney General injected the issue of race into the case while he was cross-examining Mr. Patterson when he asked, "Weren't you there one night when you met Buzz Shaw, you and another colored girl and also Moose Hannah?" (R. 137). The Attorney General further asked, "Did you ever go there in the company of a colored girl?" and "Did you ever keep company with one while down there?" (R. 137).

After the State's evidence was concluded (R. 92), Mr. Forgy's attorney moved for a directed verdict, which motion the Court overruled. (R. 93). Thereafter, Mr. Forgy took the stand in his own defense. (R. 93).

H. O. Forgy, III testified that he was single (R. 99); that he was 24 years old; that his father was H. O. Forgy, Jr.; that he had graduated from Jackson High School; that he went into the United States Army in July, 1968 and was honorably discharged in July, 1970, having served in Germany eighteen months; that he was presently in the active reserves (R. 93, 94); and that he had worked for H. O. Forgy & Son making approximately $100.00 per week at the time Shaw visited him. (R. 99).

Mr. Forgy testified that he was not guilty of selling heroin. (R. 94, 95). He said Shaw did come to his home once during the last year with Buck Brown, but did not remember the date. (R. 95). He also said it was in the afternoon when they came, at 5:30 p.m. or 6:00 p.m., and that it was still light outside, because he looked out of his window and saw Shaw's new automobile. (R. 95, 96).

When Shaw visited him, Mr. Forgy testified, only Jimmy Patterson, Shaw, Brown, and he (Mr. Forgy) were present. (R. 96). He also said that while Shaw was there no one went

to the rear of the trailer; that he did not sell Shaw any substance, nor take Shaw's watch; that Mr. Forgy had sold Shaw nothing; and that he had nothing like heroin at his trailer. (R. 97, 98).

Mr. Forgy said that when Shaw and Brown arrived, Mr. Forgy and Jimmy Patterson were drinking beer and watching television. (R. 98). He said Shaw only stayed about forty-five minutes and that, while he was there, Shaw smoked marijuana, which Shaw had brought to the trailer, with Brown and Patterson, while he (Mr. Forgy) continued only to drink beer. (R. 98).

Mr. Forgy testified that he never met Shaw at H. O. Forgy & Son and never exchanged a $20.00 bill for a watch. (R. 98). He also testified that he did not know anything about, had never touched nor had anything to do with, any substance turned over to the Jackson Police Department by Shaw. (R. 99).

Jimmy Patterson's testimony corroborated the testimony of Mr. Forgy concerning Shaw's visit. (R. 115-144). He stated that he was in the presence of Mr. Forgy, Shaw and Brown the whole forty-five minutes to one hour Shaw and Brown were at the trailer, and that no substance was sold or exchanged between Mr. Forgy and Shaw. (R. 119-120).

H. O. Forgy, Jr. (R. 144-148), Miss Lee Ann Bynum (R. 148-151), and Mrs. Florence Bynum (R. 151-153) testified on behalf of Petitioner after which the defense rested and renewed its motion for a directed verdict, which the Trial Court overruled. (R. 153).

In Petitioner's appeal to the Court of Criminal Appeals of Tennessee, his assignments of error included the following (edited):

(a) The Trial Court permitted the verdict of the jury to stand based on insufficient evidence to sustain such a verdict, *id est.*, the uncorroborated testimony of an accomplice;

(b) The Trial Court permitted the verdict of the jury to stand when the evidence in the case preponderated in favor of the innocence of the defendant and against his guilt;

(c) The Trial Court permitted the *corpus delicti* (sale of heroin) to be established by the uncorroborated testimony of an accomplice;

(d) The Trial Court permitted the verdict of the jury to stand based on the connection of the defendant with the *corpus delicti* solely by the uncorroborated testimony of an accomplice;

(e) The Trial Court permitted irrelevant, immaterial, highly inflammatory, and prejudicial testimony concerning defendant's appearance and defendant's association with black persons to be introduced by the Attorney General when said testimony was calculated to arouse the ill will of the jury.

All of the abovementioned assignments of error were overruled by the Court of Criminal Appeals of Tennessee on February 13, 1974.

Petitioner assigned as error in his Petition to the Tennessee Supreme Court for Writ of Certiorari to the Court of Criminal Appeals of Tennessee each of the above-assigned errors. Petitioner's Request for Writ of Certiorari to the Court of Criminal Appeals of Tennessee was denied, without opinion, by the Supreme Court of Tennessee on July 15, 1974. Petitioner's Motion to Reconsider Petition for Certiorari was denied August 12, 1974.

REASONS FOR ALLOWANCE OF WRIT

This Honorable Court should review this cause and grant the Petition for Writ of Certiorari to the Supreme Court of Tennessee, because each and both of the issues raised in this petition present important constitutional issues decided by the Supreme Court of Tennessee in a way not in accord with applicable decisions of this Honorable Court upholding the constitutional rights to due process of law and equal protection under the law.

First Issue

Were Petitioner's constitutional rights to due process and/or equal protection of the law violated by the Trial Court's allowing the State's attorney to inject racial and social prejudice into the trial through questioning of Petitioner and other witnesses?

In *Berger v. United States* (1935), 295 U.S. 78, 55 S.Ct. 629, this Court said:

> "The U.S. Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." 295 U.S. at 88, 55 S.Ct at 633.

The record in the case at bar reflects questions and assertions concerning Petitioner's hair length, beard, mustache, and his relationships with several black persons. Even Patterson, a witness for Petitioner, was questioned as to his contact with blacks as well as questions concerning his extracurricular activities surely calculated to bias the jury against the Petitioner and his cause. (R. 48-49, 101, 102, 113-115, 136-137). The identity of Petitioner was never in doubt and, hence, there was no necessity for the prosecution to introduce testimony concerning the before and after appearance of Forgy. On the same note, Petitioner's social activities were certainly not relevant to whether or not he, indeed, sold a controlled substance to an undercover agent, and the fact that these activities did include black persons is equally irrelevant. Surely the prosecution was determined to bias the jury by nurturing racial and social prejudices.

Statements, remarks, and innuendos of this sort by the prosecutor, which are reasonably calculated to appeal to or evoke racial prejudice, are universally condemned as being violative of the right of an accused to a fair and impartial trial. Recently a Fifth Circuit Court, consistent with prior decisions of this Honorable Court, has seen fit to hold that the admission of irrelevant facts that have a prejudicial tendency is fatal to a conviction. *United States v. Allison* (5th Cir. 1973), 474 F2d 286; *Williams v. United States* (1897), 168 U.S. 382, 18 S.Ct. 92; *Hall v. United States* (1893), 150 U.S. 76, 14 S.Ct. 22.

Improper remarks calculated to create, arouse, or inflame the sympathy, prejudice, or passion to the jury to the detriment of the accused have been condemned by numerous other cases. *AZ Din v. United States* (9th Cir. 1956), 232 F2d 283, cert. denied 77 S.Ct. 39, 352 U.S. 827; *Pietch v. United States* (10th Cir. 1940), 110 F2d 817, cert. denied 60 S.Ct. 1100, 310 U.S. 648; *Remus v. United States* (6th Cir. 1924), 291 F. 501, cert. denied 44 S.Ct. 180, 263 U.S. 717.

The Court in *United States v. Grey* (6th Cir. 1970), 422 F2d 1043 reversed a conviction founded on "the deliberate injection of racial prejudice in the U. S. Attorney's cross-examination of one of defendant's character witnesses." The Opinion at page 1046 stated:

> "Appeals to racial prejudice are foul blows and the courts of this country reject them. Where, as here, the facts are such as to indicate that such prejudicial tactics may have had a substantial influence upon the results of a trial, reversal for a new trial is ordered."

Also in *United States ex rel. Haynes v. McKendrick* (2nd Cir. 1973), 481 F2d 152 that Court at page 152 stated:

> "We agree with the District Court that the prosecutor's remarks introduced racial prejudice into the trial and thereby denied petitioner his constitutional rights under the due process clause to a fair and impartial trial. There can be no doubt that the prosecutor's remarks would have required reversal in a federal court appeal under the decisions of this and other federal courts."

The purpose and spirit of the Fourteenth Amendment requires prosecutors in state courts to refrain from racially prejudicial slurs. *Norman Williams v. United States* (6th Cir. 1970), 422 F.2d 1043, cert. denied 91 S.Ct. 380, 400 U.S. 967; *United States v. Lamerson* (5th Cir. 1972), 457 F2d 371; *United States v. Grunberger* (2nd Cir. 1970), 431 F2d 1062; *Skuy v. United States* (8th Cir. 1919), 261 F. 316.

Tennessee cases also uphold the concept that it is an improper tactic to make remarks which appeal to or tend to excite racial prejudices. *Bolin v. State* (1971), — Tenn.Cr.App. —, 472 S.W.2d 232; *Burlison v. State* (1973), — Tenn. —, 501 S.W.2d 801; *Manning v. State* (1953), 195 Tenn. 94, 257 S.W.2d 6; *Vines v. State* (1950), 190 Tenn. 644, 231 S.W.2d

332; *Hiller v. State* (1932), 164 Tenn. 388, 50 S.W.2d 225. The Tennessee Supreme Court stated in *Roland v. State* (1917), 137 Tenn. 663, 194 S.W. 1097:

> "An appeal to race prejudice on the part of a sworn officer of the state is inexcusable . . . all races are equal before the law and have the same rights in our courts. No officer of the state can be allowed to forget this, and no language by such officer that tends to arouse race feelings, even though used in heat of argument, can be passed without rebuke."

Petitioner advances the rule of law that the admission of irrelevant and prejudicial testimony goes against state and federal constitutions guaranteeing a defendant the right to "be informed of the nature and cause of the accusation." Defendant has the right to know the area to be covered, and facts not relevant to that area cause him to be taken by surprise and denies him the opportunity to prepare himself for such improper tactics. This rule also prohibits asking questions which, by innuendo, place irrelevant and prejudicial evidence before the jury. *Wharton's Criminal Evidence*, 13th Ed., Vol. 2, § 164 pp. 302-303; *Roland v. State*, supra; *Hall v. United States*, supra; *United States v. Grey*, supra.

It is readily apparent from the excerpts contained in the Statement of the Case, *supra*, that Petitioner sustained numerous foul blows to his constitutional rights by the totally irrelevant and highly prejudicial questions and innuendos injected into the trial of this case by the prosecuting attorney. Petitioner's conviction, therefore, did not result from a fair and impartial trial, free of racial and social prejudices, and he is, therefore, entitled to a new trial untainted by flagrant violations of his rights to due process and equal protection under the law. It is, therefore, respectfully submitted this Honorable Court should grant this Petition for Writ of Certiorari.

Second Issue

Were Petitioner's constitutional rights to due process and/or equal protection of the law violated by allowing the conviction to be sustained on the uncorroborated testimony of an accomplice when Tennessee law clearly states that the uncorroborated testimony of an accomplice is not sufficient to sustain a conviction?

In Tennessee, the rule of law is clearly established that a conviction in a criminal proceeding based on the uncorroborated testimony of an accomplice is prejudicial error. *Kinchelow v. State* (1844), 24 Tenn. 9, 5 Hump. 1; *Robinson & Jones v. State* (1855), 84 Tenn. 146, 16 Lea 123; *Clapp v. State* (1895), 94 Tenn. 186, 30 S.W. 214; *Smartt et al. v. State* (1904), 112 Tenn. 539, 80 S.W. 586; *Hicks v. State* (1912), 126 Tenn. 359, 149 S.W. 1055; *Collins v. State* (1935), 169 Tenn. 393, 88 S.W.2d 452; *Ripley v. State* (1950), 189 Tenn. 681, 227 S.W. 2d 26; *Moore v. State* (1968), 1 Tenn. Cr. App. 190, 432 S.W.2d 684.

In *Sherril v. State* (1959), 204 Tenn. 437, 321 S.W.2d 811, a leading Tennessee case on this subject, the Tennessee Supreme Court stated at 321 S.W.2d 814:

> ". . . Under the common law the testimony of an accomplice, if it satisfies the jury beyond a reasonable doubt of the guilt of the defendant, may be sufficient to warrant a conviction although not corroborated. The obvious dangers of this common-law rule with respect to accomplice testimony had led to the adoption in many states of statutes expressly providing that a person cannot be convicted of a crime on the uncorroborated testimony of an accomplice. In Tennessee, in absence of any general statute on this question—there being no general statute as far as we have found or been pointed out—the courts at the very beginning

> of the judicial history of this state seeing the weakness in the accomplice's testimony required corroboration in all felony cases."

Petitioner contends that Shaw, the undercover agent whose testimony incriminated Petitioner, was an accomplice in the alleged sale of a controlled substance. The definition of an accomplice as proposed in *Clapp v. State, supra,* justifies this contention. An accomplice is defined to be a person who knowingly, voluntarily, and with common intent with a principal offender, unites in the commission of a crime. This concept is reiterated in *Moore v. State, supra.* Several cases determine whether a co-actor was an accomplice by applying the test—could he himself have been indicted for the offense either as principal or accessory? *State v. Lawlor* (1881), 28 Minn. 216, 9 N.W. 698; *Casone v. State* (1952), 193 Tenn. 303, 246 S.W.2d 22.

In this particular case, the "purchasers" allegedly participated in an act *malum in se* (the sale of heroin). *Grindstaff v. State* (1964), 214 Tenn. 58, 377 S.W.2d 921. The act *malum in se* requires no specific intent. *Hurt v. State* (1947), 184 Tenn. 608, 201 S.W.2d 988. The fact the officer did not have specific intent to commit a crime does not prevent him from being an accomplice to the act as the specific intent requirement is eliminated by the offensiveness of the act to the public welfare. *Shelly v. State* (1895), 95 Tenn. 152, 31 S.W. 492; *Sherril v. State,* supra; *Scott v. State* (1960), 207 Tenn. 151, 338 S.W.2d 581; *Underwood v. State* (1971), — Tenn. Cr. App. —, 465 S.W.2d 884. These Tennessee cases have consistently held that there need be no specific intent to establish the *mens rea* to make a participant in the commission of a crime an accomplice under Tennessee law.

The State's contention that Shaw was not an accomplice, because he was a police officer, is foreclosed, we submit, by the

undeniable fact that he was operating five or six miles outside the jurisdictional limits of his authority and was not in "hot pursuit." This fact is admitted by Shaw as well as his superior. A police officer has been held to be an accomplice when he acted outside of his jurisdiction. *Elliott v. State* (1922), 92 Tex. Crim. 571, 244 S.W.2d 1007. By statute, Tennessee municipal police officers' authority extends only one mile from the corporate limits. *Tennessee Code Annotated*, § 6-609 states:

> "6-609. *Extension of police authority beyond limits.*— The authority of all incorporated towns and cities shall extend to a distance of one (1) mile from the lawful corporate limits thereof, for the suppression of all disorderly acts and practices forbidden by the general laws of the state; provided that such jurisdiction of an incorporated town or city shall not be hereby extended beyond the limits of the county in which any part of such town is situated, or so as to come within one (1) mile of any other incorporated town or city."

The important factor of Shaw acting outside his jurisdictional limits and not in "hot pursuit" while allegedly transacting the sale clearly distinguishes Petitioner's case from the majority of cases holding that an undercover agent is not considered an accomplice, most notably, *Halquist v. State* (1972), — Tenn. Cr. App.—, 489 S.W.2d 88. In the present case, Shaw knowingly acted outside his jurisdiction in participating in the commission of an act *Malum in se*. It follows that the intent of his act is supplied and, as an officer outside his jurisdiction or as a private citizen, he could be, and in fact was, an accomplice to the alleged crime.

Having set out the appropriate Tennessee law requiring the testimony of an accomplice to be corroborated in order to sustain the conviction, Petitioner asserts he was placed in an arbitrary class due to the fact he was convicted on the uncorroborated testimony of an accomplice and, thus, denied equal protec-

tion of Tennessee law. The fact that Petitioner's accomplice was a police officer acting outside his jurisdiction caused him to be placed in a class wherein he was denied due process of law and equal protection of the law, because his conviction was upheld based on the uncorroborated testimony of an accomplice. Shaw, without police authority, was a "private citizen" at the time and place of the alleged transaction and was, therefore, an accomplice.

This Honorable Court has defined the equal protection clause of the constitution to mean that the rights of all persons must rest upon the same rule under similar circumstances. *Louisville Gas & Electric Company v. Coleman* (1928), 277 U.S. 32, 48 S.Ct. 423; *Frost v. Corporation Commission of State of Oklahoma* (1929), 278 U.S. 515, 49 S.Ct. 235; *South Carolina ex rel. Phoenix Mutual Life Insurance Co. v. McMaster* (1915), 237 U.S. 63, 35 S.Ct. 504. The individual states cannot escape their duty to conform their court procedures to this definition and protect all citizens in the enjoyment of equality of rights. *United States v. Cruikshank* (1875), 92 U.S. 542; *Hill v. Texas* (1942), 316 U.S. 400, 62 S.Ct. 1159. The State of Tennessee cannot shirk its duty to apply its law equally to all persons within the class designated to be protected by the law. Petitioner contends he is within the class protected by Tennessee's unique rule of law requiring the testimony of an accomplice to be corroborated for a resulting conviction to stand. Petitioner contends he was denied equal protection of the law, because he was placed in an arbitrary class, said not to be within the scope of Tennessee's accomplice law, due to the fact his accomplice was an undercover agent in the employment of the Jackson, Tennessee Police Department. The fact remains that the undercover agent acted outside his jurisdiction allowing himself to be classified as an accomplice.

Petitioner offers to this Honorable Court an analogy to his present situation for its learned consideration. This Court has

decreed the principle that a state may not, under the equal protection clause of the Fourteenth Amendment, draw a line which constitutes an invidious discrimination against a particular class. *Levy v. Louisiana* (1968), 391 U.S. 68, 88 S.Ct. 1509; *Gomez v. Perez* (1973), 409 U.S. 535, 93 S.Ct. 872; *San Antonio Independent School District v. Rodriguez* (1973), 411 U.S. 1, 93 S.Ct. 1278. In each of these cases, this Court upheld the claim by illegitimate children that they had been denied equal protection of the law by exclusion from various statutes concerning the rights of children. Under the equal protection clause of the Fourteenth Amendment, a state was not allowed to discriminate against illegitimate children by denying them substantial benefits accorded to children generally. The Court in *Gomez v. Perez, supra,* stated at page 872:

> "We, therefore, hold that once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother; for a state to do so is illogical and unjust; and lurking problems with respect to proof of paternity cannot be made into an impenetrable barrier which works to shield otherwise invidious discrimination."

Analogous to this fact situation is Petitioner's fact situation. The State of Tennessee expounds a rule of law requiring the testimony of an accomplice to be corroborated, thereby giving Petitioner the benefit of the law, hence there should be no constitutionally sufficient justification for denying Petitioner such an essential right, because his accomplice happens to be a police officer outside his jurisdiction. Furthermore, the problems with respect to establishing the police officer as an accomplice should not be made into an impenetrable barrier which works to shield otherwise invidious discrimination. The analogy is clear. Petitioner was denied equal protection of the law, because he was

excluded from a class granted protection under Tennessee law and, instead, forced into an arbitrary class denied equal protection of Tennessee law.

Petitioner prays that this Honorable Court enforce his rights under due process of law and equal protection of the law and not allow him to be arbitrarily separated from a class normally protected under Tennessee law.

CONCLUSION

In deference to justice, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted

HENRY V. SUTTON
Attorney at Law
Suite 2904
100 North Main Building
Memphis, Tennessee 38103

and

KEMPER B. DURAND
Attorney at Law
Suite 1105
Union Planters Bank Building
Memphis, Tennessee 38103

Attorneys for Petitioner

Certificate of Service

I, Henry V. Sutton, one of Petitioner's attorneys, hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served via U.S. mail, postage prepaid, on the Attorney General of the State of Tennessee at his offices located in the Supreme Court Building, Suite 414, Nashville, Tennessee 37219, on this the ..... day of October, 1974.

HENRY V. SUTTON

APPENDIX

APPENDIX A

In the Court of Criminal Appeals of Tennessee, Jackson
September Session, 1973

H. O. Forgy, III, Plaintiff in Error, v. State of Tennessee, Defendant in Error.	No. 13 Madison Criminal Hon. William H. Williams, Judge (Selling a Controlled Substance)

For Plaintiff in Error:

Joe C. Davis, Esq.
Henry V. Sutton, Esq. and
Joe A. Dycus, Esq.
100 North Main Building
Memphis, Tennessee

For Defendant in Error:

David M. Pack
Attorney General
Nashville, Tennessee

William B. Hubbard
Assistant Attorney General
414 Supreme Court Building
Nashville, Tennessee

Whit LaFon

Affirmed

Opinion Filed: February 13, 1974

Charles H. O'Brien, Judge

OPINION

This defendant was convicted by a jury of selling heroin and sentenced to five years confinement in the State Penitentiary. The trial judge entered judgment accordingly. Motion for new trial was overruled, and defendant appeals making nine assignments of error.

The third, fourth and eighth assignments predicate error to the trial court on the premise that the State's agent who effected defendant's arrest was an accomplice. The theory being that the uncorroborated testimony of this witness established the corpus delicti and therefor a new trial was justified.

The undercover agent who testified about the delivery and sale of the heroin which brought about defendant's indictment was an officer of the Jackson, Tennessee, Municipal Police Department. According to his testimony the delivery of the controlled substance took place outside the city limits of Jackson. The payment occurred on the next day within the jurisdictional limits of that municipality. He also testified that when he set out for defendant's residence he was not aware that it was outside the city limits. When he discovered this fact, and the delivery of the alleged heroin had been made, he made the decision to conclude the sale on the next day at a place within the city and left his watch for security until payment could be made.

In *Halquist v. State*, — Tenn.Crim.App. —, 489 SW2d 88, this court held:

> "Likewise unmeritorious is the defendant's complaint that the trial court rejected his theory that the undercover agent was an accomplice and declined to instruct the jury that the testimony of an accomplice must be corroborated. The applicable rule of law is stated as follows in 23 C.J.S. Criminal Law Sec. 788, p. 11:

> 'A detective or police officer who is engaged in attempts to discover violations of the law is not an accomplice of one charged with such a violation, even though the detective may have been instrumental in procuring the specific violation of the law on which the prosecution is based. Familiar illustrations of this principle are found in cases where detectives or other officers, investigating alleged illegal sales of liquor, purchase such liquor for the purpose of securing evidence, or where detectives join a conspiracy or a criminal organization for the purpose of exposing it and bringing the criminals to punishment.
>
> Where informers or agents, under the direction of public authorities, continue to act with their guilty confederates until the matter can be so far advanced and matured as to insure the conviction and punishment of such confederates, the informers are not accomplices.' "

It makes little difference, as in this case, that the pursuit of the investigation leads the officer beyond the limits of his jurisdiction to arrest, or otherwise function as a police officer. It would be a curious anomoly if we were to say that this officer, having taken care to conceal his identity, and having infiltrated into the milieu where persons engaged in the use of and trafficking in drugs, while in the company of a drug user leading him to a source of supply must forego and desist from his investigation when he crossed the city line. Such conduct could as easily have endangered his life as it could have impaired his investigative efforts.

As set forth in one of the earlier cases cited in defendant's brief, "an accomplice is defined to be a person who knowingly, voluntarily, and with common intent with the principle offender, unites in the commission of a crime." *Clapp v. State*, 94 Tenn. 186, 30 S.W. 214 (1894). In this case the undercover agent

drove another individual, Buck Brown, to defendant's trailer home where each of them purchased a small aluminum foil packet. The one sold to the agent subsequently was analyzed to be heroin. Had, under these circumstances, the State's agent observed defendant sell to Brown only, and then reported him for arrest, would he then be an accomplice? The argument is too frivolous for consideration. We hold that the undercover agent cannot be considered as as accomplice in this case, and, although we do find other evidence in this record which points to defendant's guilt, the corroboration of his testimony was unnecessary.

The first and second assignments of error otherwise attack the weight and sufficiency of the convicting evidence.

Clarence Shaw testified that on the date of the offense for which defendant was convicted he was an undercover police agent for the city of Jackson, assigned to the Narcotic Division. At about 9:30 or 10:00 o'clock p.m., on December 8th, 1971, in the company of an individual named Buck Brown, he visited the trailer home of defendant on Steam Mill Ferry Road in Madison County outside the city limits of Jackson. He made an in-court identification of defendant as the person whom he visited. Three persons other than the defendant were present in the trailer when they arrived there. He and Brown accompanied defendant from the front room of the trailer to a rear bedroom where defendant produced a vial containing four aluminum foil packets which he distributed. The witness gave a description of the room arrangement of the trailer. When they returned to the front room three persons including defendant and Brown prepared and injected the substance contained in their individual foil packages. The agent placed his packet in his pocket. After leaving the trailer he went to his apartment where it was labeled and tagged. Subsequently the substance contained in the packet was analyzed as heroin. He did not remember having ever met defendant before.

The evidence is conflicting in that defendant denied having sold heroin. He admitted that the undercover agent had come to his trailer in the company of Buck Brown, but stated it was between 5:30 and 6:00 in the afternoon. He admitted that Patterson was present but denied the presence of any others. He denied they went to the rear of the trailer; denied there was any sale of any nature; denied he had accepted the wrist watch as security. He said that Shaw and Brown stayed approximately 45 minutes during that time everyone there except himself smoked some marijuana which Shaw had brought with him. He denied having ever seen the undercover agent before his visit to the trailer. Defendant's testimony was generally corroborated by Jimmy Patterson.

The proposition that the greater weight of the total evidence preponderates in favor of defendant's innocence must be tested by the rule in this State, that a jury's verdict of guilty approved by the trial judge establishes the credibility of the witnesses supporting the verdict, displaces the presumption of innocence that attached to the defendant in the trial court, and raises a presumption of guilt, putting on defendant the burden of showing, on appeal, that the evidence preponderates against the verdict and in favor of his innocence. *Powell v. State*, — Tenn. Crim.App. —, 489 S.W.2d 538. We cannot find appellant has carried this burden and these assignments must be overruled.

The fifth assignment complains that the trial court erred in admitting into evidence, over defendant's objection, testimony that at the time of the alleged offense defendant had long hair, a beard, mustache, and other physical characteristics, which implied he was a "hippie"; and in admitting into evidence testimony that defendant and one of his witnesses had social relationships with young black people. That this was prejudicial because it categorized defendant as a "hippie", and characterized him and his witness as persons who mixed and mingled freely with young black persons. That the introduction of this

testimony on the part of the State was by design, and calculated to inflame passion, bias, and prejudice on the part of the jury.

We apply ourself first to the issue of the testimony relative to defendant's appearance. The witness, Shaw, was asked if there was a difference in defendant's appearance from that which existed on the date of the offense. He testified over objection that at that time defendant had a beard, a longer mustache, and longer hair. He was then asked if there was any question in his mind as to the identity of defendant even though there was this change in his appearance. These questions surely went to the identity of defendant and were proper. The other reference to defendant's appearance came on cross-examination when he was asked to describe his hair on the night that Shaw came to his house. We do not think the inquiry into this matter was extensive or incontinent. If the defendant assumed the guise and physical appearance which categorized him as a "hippie", and therefore a member and participant of the drug culture, it is certainly not the State which places him in that category by inquiring into his manner of dress and appearance.

The first reference to defendant's association with blacks which is complained of came on cross-examination of the defendant. He had stated on direct examination that the undercover agent had come to his trailer with Buck Brown. He had testified he had known Brown for about a year. Brown was in the court room at the time these questions were posed. It was obvious he was a black man. On cross-examination he was asked if Brown was not a good friend, and how many times he had visited in defendant's home. The State's proof was that Brown, among others, received and used heroin at the trailer. We think this inquiry into the relationship with Brown was proper cross-examination. The other racial reference complained of came in the cross-examination of defense witness, Patterson. He had testified on direct examination that he was acquainted with Brown. On cross-examination he testified that

he did not recall having ever seen the undercover policeman, Clarance Shaw, also a black man, before the night of December 8th, 1971. He was cross-examined about his personal relationship with Brown, which had included several trips together to Memphis, and if he had made any trips from Memphis with any other colored boys than Brown. When he denied knowing Shaw, he was cross-examined about his association with Shaw and other black persons at a nightclub in Jackson. A review of the complete Bill of Exceptions makes it apparent that this was proper cross-examination, made for the purpose of introducing relevant evidence into the record, and not designed, as is suggested, to inflame the passion or bias of the jury to the prejudice of defendant. In only one instance was an objection raised by the defense, which was properly overruled by the trial court. We find the assignment to be without merit.

Regarding the sixth assignment, we find no error in the admission into evidence of a vial which contained a label marked "heroin". When the introduction of this small plastic bottle was first attempted, the objection to its admission was sustained. After the witness from the State toxicology laboratory identified the substance contained in the plastic vial as heroin the vial was admitted in evidence as an exhibit over objection of the defendant. It is clear from the testimony of Lt. J. R. Moore that he attached the label on the vial in question. It is equally clear from examination that he made the notation in question although he did not testify so directly. We do not find that defendant was prejudiced by the admission of this exhibit and the assignment is overruled.

The seventh assignment charges error to the trial court in refusing to instruct the jury in accordance with defendant's special request for instructions on the absent witness rule.

The State did not call Buck Brown as a witness. During the direct testimony of the defendant, Brown was excused from the

courtroom. On cross-examination defendant stated he planned to use Brown as a witness. It is defendant's theory that the jury should have been instructed to the effect that this witness would testify favorably to the State, and that the charge as given was inadequate and prejudicially effected the defense. It is highly unlikely that Brown would have confirmed the testimony of the State's witness that he had received, and injected himself with heroin in defendant's trailer. He was equally available to both parties, and the State was under no obligation to call him as a witness. We hold that the statement of law charged by the trial judge in this case was correct and justified under the proof before the jury.

By the final assignment error is charged in failing to grant defendant's motion for new trial based on newly discovered evidence.

In his direct testimony the State's witness testified he had never used marijuana. Both defendant, and his witness, Patterson, testified that defendant smoked marijuana while he was in defendant's trailer. At his motion for new trial defendant introduced the affidavit of a witness in which he stated he had observed the undercover agent engaged in the act of smoking marijuana sometime in the month of November or December, 1971.

The matter of granting a new trial on the basis of newly discovered evidence is a discretionary matter with the trial judge. *Moore v. State*, 96 Tenn. 209, 33 S.W. 1046; *Hawkins v. State*, 220 Tenn. 383, 417 S.W.2d 774. We find no abuse of discretion on the part of the trial judge. Further, newly discovered evidence which is merely cumulative and newly discovered evidence which is merely impeaching will not constitute grounds for a new trial. *Freshwater v. State*, 2 Tenn.Crim.App. 314, 453 S.W.2d 446.

All assignments are overruled, and the judgment of the trial court affirmed.

/s/ Charles H. O'Brien
Charles H. O'Brien
Judge

Concur:

/s/ Charles Galbreath
Charles Galbreath
Judge

/s/ Robert K. Dwyer
Robert K. Dwyer
Judge

APPENDIX B

In the Supreme Court of Tennessee
At Jackson

H. O. Forgy, III,
Petitioner,
vs.
State of Tennessee,
Respondent.
} Madison Criminal.

ORDER

(Filed July 15, 1974)

Upon consideration of the petition for the writ of certiorari and the motion of petitioner's to strike and expunge from the record the reply of the State on the ground that said reply was filed after the expiration of the time permitted by the rules, the Court is of the opinion that the petition for the writ of certiorari is without merit and should be denied and, therefore, the motion to strike and expunge from the record the State's reply should also be denied since the matter is moot. It is so Ordered.

Per Curiam

APPENDIX C

State of Tennessee

Supreme Court

Court of Appeals

Court of Criminal Appeals

Jewell Redden, Clerk

Jackson, August 12, 1974

H. O. Forgy, III,
vs.
State of Tennessee.
} Madison Criminal No. 13

Petition to reconsider denial of certiorari is **denied.**

No Written Opinion.

Respectfully

JEWELL REDDEN
Clerk

APPENDIX D

In the Court of Criminal Appeals of Tennessee
Western Division

H. O. Forgy, III,
Plaintiff in Error,
vs.
State of Tennessee,
Defendant in Error.

Madison Criminal No. 13

Order Granting Stay of Execution of Judgment Pending Certiorari

(Filed September 10, 1974)

This cause came on to be heard on plaintiff in error's Motion to Stay Execution of Judgment Pending Certiorari, argument of counsel, and on the entire record from all of which it appearing to the Court that the plaintiff in error's Motion to Stay Execution Pending Certiorari should be and is hereby granted, provided that plaintiff in error's Petition for Certiorari be filed with the Clerk of the United States Supreme Court no later than thirty days from the date of this order.

It is therefore ordered that the execution of the judgment and sentence in this case be and is hereby stayed pending the filing of plaintiff in error's Petition for Certiorari in the Supreme Court of the United States and the disposition of said Petition.

It is further ordered that if plaintiff in error's Petition for Certiorari is not filed with the Clerk of the United States Supreme Court no later than thirty days from this order, the judg-

ment and sentence of the lower court will be executed forthwith.

It is further ordered that the $10,000.00 bond presently in effect in this cause be and is hereby allowed to remain in effect subject to the above provisions of this order.

This the 10th day of September, 1974.

ROBERT K. DWYER
Judge

JOHN A. MITCHELL
Judge

WILLIAM S. RUSSELL
Judge

Approved for Entry:

HENRY V. SUTTON
Attorney for Plaintiff in Error

WILLIAM B. (Illegible)
Assistant Attorney General

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-397

H. O. FORGY, III,

Petitioner

v.

STATE OF TENNESSEE,

Respondent

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

ROBERT H. ROBERTS,
Advocate General
Supreme Court Building
Nashville, Tennessee 37219
Attorney for Respondent

R. A. Ashley, Jr., Attorney General
State of Tennessee
Of Counsel

TENNESSEE LAW PRINTERS, P. O. Box 377, Knoxville, Tennessee. Phone 525-4361

INDEX

	Page
JURISDICTION	1
OPINIONS BELOW	1
QUESTIONS PRESENTED	2
BRIEF STATEMENT OF THE CASE	2
ARGUMENT	
QUESTION ONE	3
QUESTION TWO	10
CONCLUSION	13
CERTIFICATE OF SERVICE	14

CITATIONS

CASES CITED

Casone v. State, 193 Tenn. 303, 246 S.W.2d 22 (1952)	4
Clapp v. State, 94 Tenn. 186, 30 S.W. 214 (1894)	9
Elliott v. State, 92 Tex. Cr. R. 571, 244 S.W. 1007	7
Halquist v. State, 489 S.W.2d 88 (1972)	6, 8
Harris v. State, 75 Tenn. 124, 7 Lea 124	6
Levering v. Commonwealth, 132 Ky. 666, 117 S.W. 253 (1909)	5
Monts v. State, 214 Tenn. 171, 379 S.W.2d 34	3, 6
Moore v. State, 432 S.W.2d 684	6

Pennington v. State,
478 S.W.2d 892 6

People v. Pigg,
308 P.2d 884 7

Scott v. State,
207 Tenn. 151, 338 S.W.2d 581 (1960)..... 3, 4

Sherrill v. State,
204 Tenn. 427, 321 S.W.2d 811 (1959)..... 3, 4

Smartt v. State,
80 S.W. 586, 112 Tenn. 539..... 6

State v. Bowman,
92 Utah 540, 70 P.2d 458 5

State v. Phillips,
18 S.D. 1, 98 N.W. 171 5

State v. Riddell,
38 R.I. 506, 96 A. 531 5

State v. Umble,
115 Mo. 452, 22 S.W. 378 5

OTHER AUTHORITIES CITED

53 A.L.R. 2d 817 4
14 Am. Jur., Criminal Law, Sec. 112 5
23 C.J.S., Criminal Law, Sec. 788, p. 11..... 8
23 C.J.S., Criminal Law, Sec. 792..... 5
23 C.J.S., Criminal Law, Sec. 798(20) 6
Wharton's Criminal Evidence (12th Ed.),
Sec. 448, p. 229 4
Section 39-112, Tennessee Code Annotated 4
Section 52-1408, Tennessee Code Annotated ... 5
Section 52-1413, Tennessee Code Annotated ... 5
Section 52-1432, Tennessee Code Annotated ... 5
Section 52-1448, Tennessee Code Annotated ... 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

H. O. FORGY, III,

Petitioner

v.

STATE OF TENNESSEE,

Respondent

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

JURISDICTION

Respondent admits jurisdiction, but denies that it raises a Federal constitutional question.

OPINIONS BELOW

The Petitioner's brief, Appendix A, contains the opinion of the Court of Criminal Appeals of Tennessee; Appendix B and Appendix C contain the action of the Supreme Court

of Tennessee denying writ of certiorari, and Appendix D contains the order of the Court of Criminal Appeals permitting bail bond pending action of this Honorable Court.

QUESTIONS PRESENTED

QUESTION ONE

DID THE PROSECUTING ATTORNEY INJECT RACIAL AND SOCIAL PREJUDICES INTO THE TRIAL THROUGH QUESTIONING THE PETITIONER AND OTHER WITNESSES IN SUCH A MANNER AS TO VIOLATE THE RIGHTS OF THE PETITIONER?

QUESTION TWO

IS AN UNDERCOVER AGENT AN ACCOMPLICE UNDER THE LAWS OF TENNESSEE SO THAT HIS TESTIMONY MUST BE CORROBORATED, AND IF SO, DOES THIS RAISE A FEDERAL CONSTITUTIONAL QUESTION?

BRIEF STATEMENT OF THE CASE

On December 8, 1971 an undercover agent for the Jackson, Tennessee Police Department got with a friend of the defendant (petitioner here) in Jackson, and they drove some five miles outside the city limits to where the defendant resided in a trailer. Others, in addition to the defendant, were present.

There the undercover agent, Shaw, together with his companion Brown, purchased for $20.00 a pack each of drugs and, since they were outside the city limits, Shaw left his watch as security. The following day Shaw met the defendant inside the city, where he gave him $20.00 and redeemed his watch.

Any other pertinent facts regarding the evidence will be covered in the following argument.

ARGUMENT

QUESTION ONE

The defendant contends that Shaw, the undercover police officer, was an accomplice to the selling of heroin and therefore his testimony must have been corroborated before the conviction can stand. Defendant bases this contention on the basis that Shaw was outside of the territorial jurisdiction of his police department when the alleged crime occurred.

The State on the other hand takes the position that Shaw was not an accomplice. This position is based upon two premises: first, that a buyer of a narcotic is not an accomplice to the seller and second, that one participating in a crime solely to assist law enforcement officials in apprehending other participants in said crime is only a "feigned accomplice."

The defendant has argued the inconsistency in criminal law of requiring corroboration of the testimony of a child incapable of consenting to participating in a crime and has attempted to formulate a rule defining accomplice from this inconsistency. The leading case of *Monts v. State*, 214 Tenn. 171, 379 S.W.2d 34, speaks to both of these issues:

> "It is well settled in this State, by judicial decision, and in many other American jurisdictions, by statutory enactment, that a defendant cannot be convicted upon the uncorroborated testimony of an accomplice in his crime. *Sherrill v. State*, 204 Tenn. 427, 321 S.W.2d 811 (1959); *Scott v. State*, 207 Tenn. 151, 338

S.W.2d 581 (1960). As to who is an accomplice within this rule is a point upon which the American cases are not in complete harmony. (E.g., see annotation in 53 A.L.R.2d 817). The definition most often found in the cases is the one recited in Wharton's Criminal Evidence (12th Ed.) sec. 448 at page 229: 'a person who knowingly, voluntarily, and with common intent with the principal offender unites with him in the commission of the crime.' The test generally applied by the courts in this country is whether the alleged accomplice could be indicted for the same offense charged against the defendant. Wharton's Criminal Evidence (12th Ed.) sec. 448 at page 230. *Casone v. State*, 193 Tenn. 303, 246 S.W.2d 22 (1952). There are exceptions to this test such as where the accomplice or participant in the defendant's crime is a child of such tender years as to be incapable of consenting to the crime in which he participates. Corroboration in such a case is required even though under the above test, the child would not be considered an accomplice. *Sherrill v. State*, supra; *Scott v. State*, supra. But for the most part, the test cited is the one used in determining whether the accomplice rule applies to given testimony.

"In Tennessee, an accessory after the fact is not subject to indictment for the offense committed by his principal; but rather he is guilty of a separate and distinct offense defined in sec. 39-112, T.C.A. Thus under the generally accepted test, an accessory after the fact could not be considered as an accomplice within the rule requiring that the testimony of an accomplice be corroborated. This appears to be the result reached in all the States that have passed on this question with the exception of Arkansas and Texas.

14 Am. Jur., Criminal Law, sec. 112; 23 C.J.S. Criminal Law sec. 792; *State v. Bowman*, 92 Utah 540, 70 P.2d 458, 111 A.L.R. 1393 (1937); *State v. Phillips*, 18 S.D. 1, 98 N.W. 171 (1904); *State v. Riddell*, 38 R.I. 506, 96 A. 531 (1916); *State v. Umble*, 115 Mo. 452, 22 S.W. 378 (1893); *Levering v. Commonwealth*, 132 Ky. 666, 117 S.W. 253 (1909)." Tenn. 191-192.

The defendant was convicted of violating T.C.A. § 52-1432 which states:

"(a) except as authorized by §§ 52-1408 - 52-1448, it is unlawful for any person to manufacture, deliver, sell, or possess with intent to manufacture, deliver or sell, a controlled substance. (1) Any person who violates this section with respect to: (A) A controlled substance classified in Schedule I is guilty of a felony and upon conviction shall be imprisoned for not less than five (5) years or more than fifteen (15) years and in addition thereto may be fined not more than eighteen thousand dollars ($18,000.00);"

Heroin is classified in Schedule I, T.C.A. § 52-1413.

Shaw could not have been indicted for the same offense as the defendant, because there was no intent upon his part to manufacture, deliver or sell. Shaw could have only been indicted under T.C.A. § 52-1432(b) which states:

"It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by §§ 52-1408 - 52-1448.

"(1) Any person who violates this subsection shall be guilty of a misdemeanor and, upon first conviction, be sentenced to confinement in a county jail or workhouse for a period not to exceed eleven (11) months, twenty-nine (29) days and/or fined an amount not to exceed one thousand ($1,000) or may have the sentence pending upon him for this violation suspended and may be as a condition of the suspension be required to participate in a program of rehabilitation at a drug treatment facility operated by the state or a comprehensive community mental health center."

These are clearly separate offenses.

Tennessee has clearly made this distinction. *Pennington v. State*, 478 S.W.2d 892, and *Monts v. State*, *supra* (an accessory after the fact is not an accomplice to the principal); *Harris v. State*, 75 Tenn. 124, 7 Lea 124 (receiving stolen goods or compounding a felony is not an accomplice to robbery); *Moore v. State*, 432 S.W.2d 684 (larceny is not an accomplice to receiving and concealing stolen goods); *Smartt v. State*, 80 S.W. 586, 112 Tenn. 539 (the subject of an abortion is not an accomplice to the abortion). Also see 23 C.J.S. Criminal Law § 798(20) which states the black letter law:

"In general, in prosecutions for violations of narcotic laws, the purchasers of the drugs are not regarded as accomplices."

The defendant correctly states that the law in this State is that a detective or police officer engaged in an attempt to discover violations of the law is not an accomplice. *Halquist v. State*, 489 S.W.2d 88, 94 (1972). This rule of law is based on the proposition that one who does not instigate a crime, but merely accompanies the instigators to facilitate their subsequent prosecution has no criminal

intent and is a mere "feigned accomplice." The issue before this court is whether a paid undercover agent whose job takes him outside the territorial jurisdiction of his employer, suddenly becomes an accomplice and subject to prosecution. For the law to supply the necessary criminal intent when the border is passed would be against sound policy. The overriding interest is in detecting crimes and successfully prosecuting these crimes. In *People v. Pigg*, 308 P.2d 884, the California Court held that a citizen who, without contacting the law enforcement authorities, participated in a burglary to assist in the criminal prosecution, was a "feigned accomplice" and his testimony did not require corroboration.

The defendant cites *Elliott v. State*, 92 Tex. Cr. R. 571, 244 S.W. 1007, in support of his contention that Shaw was an accomplice. That case merely held that it was a jury question as to whether the witness was an actual or a "feigned accomplice," and that the jury upon proper request should have been charged on these points. Please note that Texas is an exception to the general rule defining accomplice as set out in A. above.

In the instant case there was no evidence to rebut Shaw's testimony that he was a "feigned accomplice" and there was no objection or special request made on this point.

The Court of Criminal Appeals replied to this question as follows:

> The third, fourth and eighth assignments predicate error to the trial court on the premise that the State's agent who effected defendant's arrest was an accomplice. The theory being that the uncorroborated testimony of this witness established the corpus delicti and therefor a new trial was justified.

The undercover agent who testified about the delivery and sale of the heroin which brought about defendant's indictment was an officer of the Jackson, Tennessee, Municipal Police Department. According to his testimony the delivery of the controlled substance took place outside the city limits of Jackson. The payment occurred on the next day within the jurisdictional limits of that municipality. He also testified that when he set out for defendant's residence he was not aware that it was outside the city limits. When he discovered this fact, and the delivery of the alleged heroin had been made, he made the decision to conclude the sale on the next day at a place within the city and left his watch for security until payment could be made.

In *Halquist v. State*, *supra*, this court held:

"Likewise unmeritorious is the defendant's complaint that the trial court rejected his theory that the undercover agent was an accomplice and declined to instruct the jury that the testimony of an accomplice must be corroborated. The applicable rule of law is stated as follows in 23 C.J.S. Criminal Law Sec. 788, p. 11:

> 'A detective or police officer who is engaged in attempts to discover violations of the law is not an accomplice of one charged with such a violation, even though the detective may have been instrumental in procuring the specific violation of the law on which the prosecution is based. Familiar illustrations of this principle are found in cases where detectives or other officers, investigating alleged illegal sales of liquor, purchase such liquor for the purpose of securing evidence, or where detectives join a conspiracy or a crimi-

> nal organization for the purpose of exposing it and bringing the criminals to punishment.
>
> Where informers or agents, under the direction of public authorities, continue to act with their guilty confederates until the matter can be so far advanced and matured as to insure the conviction and punishment of such confederates, the informers are not accomplices.'"

It makes little difference, as in this case, that the pursuit of the investigation leads the officer beyond the limits of his jurisdiction to arrest, or otherwise function as a police officer. It would be a curious anomoly if we were to say that this officer, having taken care to conceal his identity, and having infiltrated into the milieu where persons engaged in the use of and trafficking in drugs, while in the company of a drug user leading him to a source of supply must forego and desist from his investigation when he crossed the city line. Such conduct could as easily have endangered his life as it could have impaired his investigative efforts.

As set forth in one of the earlier cases cited in defendant's brief, "an accomplice is defined to be a person who knowingly, voluntarily, and with common intent with the principle offender, unites in the commission of a crime." *Clapp v. State*, 94 Tenn. 186, 30 S.W. 214 (1894). In this case the undercover agent drove another individual, Buck Brown, to defendant's trailer home where each of them purchased a small aluminum foil packet. The one sold to the agent subsequently was analyzed to be heroin. Had, under these circumstances, the State's agent observed defendant sell to Brown only, and then reported him for arrest, would he then be an accomplice? The argument is too frivo-

lous for consideration. We hold that the undercover agent cannot be considered as an accomplice in this case, and, although we do find other evidence in this record which points to defendant's guilt, the corroboration of his testimony was unnecessary.

QUESTION TWO

In this Assignment of Error, the defendant has raised the issue as to whether the Attorney General was attempting to play upon the racial biases of the jury. It should be noted that this Bill of Exceptions does not reflect whether the defendant was black or white and whether Jimmy Patterson was black or white. The Bill of Exceptions does reflect that Buck Brown was black. However, the State contends that even if this record did reflect that the defendant is white and Jimmy Patterson is white there is no evidence of an attempt on the Attorney General's part to appeal to the prejudices and biases of the jury. The defendant first argues that it was error for the Attorney General to bring out the point that Buck Brown frequently visited the trailer of the defendant. Buck Brown is the one who accompanied the undercover agent to the defendant's trailer. This testimony only served to substantiate the testimony of Shaw by showing that the defendant and Buck Brown were good friends and the defendant would not be suspicious of any individual who accompanied Buck Brown to purchase heroin. It might also be pointed out that this record does not reveal whether the undercover agent was white or black.

The questions concerning Jimmy Patterson's association with a black girl in a party club at Jackson, have previously been covered. There was no racial issue injected into this court proceeding, and as a result this Assignment of Error is totally without foundation.

The Tennessee Court of Criminal Appeals found, in reference to this assignment, as follows:

> The fifth assignment complains that the trial court erred in admitting into evidence, over defendant's objection, testimony that at the time of the alleged offense defendant had long hair, a beard, mustache, and other physical characteristics, which implied he was a "hippie"; and in admitting into evidence testimony that defendant and one of his witnesses had social relationships with young black people. That this was prejudicial because it categorized defendant as a "hippie", and characterized him and his witness as persons who mixed and mingled freely with young black persons. That the introduction of this testimony on the part of the State was by design, and calculated to inflame passion, bias, and prejudice on the part of the jury.
>
> We apply ourself first to the issue of the testimony relative to defendant's appearance. The witness, Shaw, was asked if there was a difference in defendant's appearance from that which existed on the date of the offense. He testified over objection that at that time defendant had a beard, a longer mustache, and longer hair. He was then asked if there was any question in his mind as to the identity of defendant even though there was this change in his appearance. These questions surely went to the identity of defendant and were proper. The other reference to defendant's appearance came on cross-examination when he was asked to describe his hair on the night that Shaw came to his house. We do not think the inquiry into this matter was extensive or incontinent. If the defendant assumed the guise and physical appearance which categorized him as a "hippie", and therefore a member and participant of the drug culture, it is certainly not the State which

places him in that category by inquiring into his manner of dress and appearance.

The first reference to defendant's association with blacks which is complained of came on cross-examination of the defendant. He had stated on direct examination that the undercover agent had come to his trailer with Buck Brown. He had testified he had known Brown for about a year. Brown was in the courtroom at the time these questions were posed. It was obvious he was a black man. On cross-examination he was asked if Brown was not a good friend, and how many times he had visited in defendant's home. The State's proof was that Brown, among others, received and used heroin at the trailer. We think this inquiry into the relationship with Brown was proper cross-examination. The other racial reference complained of came in the cross-examination of defense witness, Patterson. He had testified on direct examination that he was acquainted with Brown. On cross-examination he testified that he did not recall having ever seen the undercover policeman, Clarance Shaw, also a black man, before the night of December 8th, 1971. He was cross-examined about his personal relationship with Brown, which had included several trips together to Memphis, and if he had made any trips from Memphis with any other colored boys than Brown. When he denied knowing Shaw, he was cross-examined about his association with Shaw and other black persons at a nightclub in Jackson. A review of the complete Bill of Exceptions makes it apparent that this was proper cross-examination, made for the purpose of introducing relevant evidence into the record, and not designed, as is suggested, to inflame the passion or bias of the jury to the prejudice of defendant. In only one instance was an objection

raised by the defense, which was properly overruled by the trial court. We find the assignment to be without merit.

CONCLUSION

The respondent, therefore, respectfully insists that no constitutional question is raised as a result of the petitioner being required to discuss his appearance at the time of the offense, as contrasted with his appearance in court for purposes of establishing identity, and questions relating to the type of people with whom he associates for the purpose of showing guilty knowledge likewise raises no Federal constitutional question.

Secondly, respondent insists that an undercover agent is not an accomplice and that no corroboration of his testimony, therefore, is required.

Respectfully submitted,

ROBERT H. ROBERTS,
Advocate General
State of Tennessee

R. A. ASHLEY, JR.,
Attorney General & Reporter,
State of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing reply on behalf of respondent to petition for writ of certiorari to the Court of Criminal Appeals of Tennessee has this day been forwarded, by first class postage paid mail, to adversary counsel herein, Honorable Henry V. Sutton, Attorney-at-Law, Suite 2904, 100 North Main Building, Memphis, Tennessee 38103, and Honorable Kemper B. Durand, Attorney-at-Law, Suite 1105, Union Planters Bank Building, Memphis, Tennessee 38103, this ____ day of October, 1974.

/s/ Robert H. Roberts
ROBERT H. ROBERTS,
Advocate General

INDEX

Page

Cases Cited

Clapp v. State (1895), 94 Tenn. 186, 30 S.W. 214 7

Hicks v. State (1912), 126 Tenn. 393, 88 S.W. 2d 452 .. 7

Kinchelow v. State (1844), 24 Tenn. 9, 5 Hump. 1 7

Mays v. United States (8th Cir. 1958), 261 F. 2d 662 ... 6

Moore v. State (1968), 1 Tenn. Cr. App. 190, 432 S.W. 2d 684 7

Nye & Neissen v. United States (1949), 336 U.S. 613, 69 S. Ct. 766 6

Ripley v. State (1950), 189 Tenn. 681, 227 S.W. 2d 26 .. 7

Robinson & Jones v. State (1855), 84 Tenn. 146, 16 Lea 123 7

Scott v. State (1960), 207 Tenn. 151, 338 S.W. 2d 581 .. 7

Shelly v. State (1895), 95 Tenn. 152, 31 S.W. 492 7

Sherril v. State (1959), 204 Tenn. 437, 321 S.W. 2d 811 7

Smartt et al. v. State (1904), ... S.W. 2d 452 7

United States v. Wilson (D.C. Wash. 1932), 59 F. 2d 47 .. 6

Text Cited

Wharton's Criminal Evidence, Volume 2, 12th Edition 1955, § 448 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

H. O. FORGY, III,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

REBUTTAL TO REPLY

Of Respondent to Petition for Writ of Certiorari to the Court of Criminal Appeals of Tennessee

Henry V. Sutton and Kemper B. Durand, retained counsel for Petitioner, H. O. Forgy, III, find it necessary to submit a rebuttal to Respondent's reply.

REBUTTAL

Question One

As stated by Petitioner:

(1) Were Petitioner's constitutional rights to due process and/or equal protection of the law violated by the Trial Court's

allowing the State's attorney to inject racial and social prejudices into the trial through questioning of Petitioner and other witnesses?

As stated by Respondent:

(1) Did the prosecuting attorney inject racial and social prejudices into the trial through questioning the Petitioner and other witnesses in such a manner as to violate the rights of the Petitioner?

The record clearly shows that the State's attorney subjected petitioner as well as other witnesses to a line of questioning calculated to inflame the racial and social prejudices of the jury. Petitioner was questioned about his past and present appearance although his identity was never in doubt. Other witnesses were questioned about their social relationships with black persons although where they went and what they did during these outings was not at all relevant to whether or not the alleged sale of heroin to Shaw was ever made by Petitioner.

In its Reply Respondent states at page 10, "It might also be pointed out that this record does not reveal whether the undercover agent was white or black." Petitioner wishes to correct this false statement by quoting the applicable sections of the Court record of the testimony of H. O. Forgy, III, as follows:

> Q. 63. Actually *Shaw is a black man*, isn't he?
>
> A. *That's right.*
>
> Q. 64. Well, hasn't your father been active in Civil Rights which is primarily for the black person?
>
> A. That's right.
>
> Q. 65. Would you tell us then why this black man would come in here against your father?
>
> (T.R. 106) (Emphasis added)

The State attorney's questions relating to Petitioner's beard, longer mustache and longer hair provided sufficient information to kindle the innuendo that Petitioner was a member of the "hippie" sub-culture. Furthermore, the State attorney's questions concerning the profession of Jimmy Patterson and the trips he took to Memphis were sufficient to imply that he was involved in drug trafficking even though Patterson answered the proposed questions in the negative. Race was brought up in reference to the bi-racial friendship between Petitioner and Buck Brown as well as the questions to Patterson, "Did you make any trips from Memphis with any other colored boys other than Buck Brown?" (R.133) and "Weren't you there one night when you met Buzz Shaw, you and another colored girl and also Moose Hannah?" (R.137)

Regardless of the Respondent's excuses for pursuing these questions, the prejudicial innuendo produced by such a line of questioning is undeniable. The State itself relies on prejudice in its argument forcing Petitioner into an arbitrary class merely because he has long hair. Quoting the Tennessee Court of Criminal Appeals, Respondent's reply reads at page 11:

> "If the defendant assumed the guise and physical appearance which categorized him as a 'hippie' and therefore a member and participant of the drug culture, it is certainly not the State which places him in the category by inquiring into his manner of dress and appearance."

The length of Petitioner's hair and manner of dress do not justify his being arbitrarily classed as a "hippie" necessarily connected with the drug culture.

This is precisely the point of Petitioner's Complaint. The entire record is tainted by such arbitrary classifications coupled with prejudicial innuendo. No man stands to be convicted because of his appearance or associations.

Petitioner prays that this flagrant violation of his Constitutional rights to due process and/or equal protection of the law be rectified.

Question Two

As stated by Petitioner:

(2) Were Petitioner's Constitutional rights to due process and/or equal protection of the law violated by allowing the conviction to be sustained on the uncorroborated testimony of an accomplice, when Tennessee law clearly states that the uncorroborated testimony of an accomplice is not sufficient to sustain a conviction?

As stated by Respondent:

(2) Is an undercover agent an accomplice under the laws of Tennessee so that his testimony must be corroborated, and if so, does this raise a federal constitutional question?

Petitioner argues that the alleged undercover agent, Shaw, operated outside his jurisdictional limits, and, therefore, can be deemed an accomplice. Tennessee consistently requires that the testimony of an accomplice be corroborated to sustain a conviction.

Respondent answers with a repertoire of Tennessee statutes and other quotations of law. These citations deal with an individual who has acted within his jurisdictional limits. In the instant case the alleged activity admittely took place five or six miles outside the city limits of Jackson, Tennessee, by whom Shaw was employed.

Furthermore, Hespondent argues that Shaw did not have the necessary intent to commit the crime alleged. Petitioner argues

that the sale of heroin is an act *malum in se* which requires no specific intent on the part of the participant. Shaw was five or six miles outside his jurisdiction allegedly participating in an act that Petitioner contends, requires no specific intent. The alleged sale could not take place without a buyer. Shaw allegedly was that buyer and was an accomplice.

Wharton's Criminal Evidence, Volume 2, 12th Edition 1955 §448 states.

> "To constitute one an accomplice, he must perform some act or take some part in the commission of the crime or owe some duty to the person in danger that makes incumbent on him to prevent its commission. An accomplice is one culpably implicated in, or who unlawfully co-operates, aids, abets, or assists in the commission of the crime charged."

Petitioner submits that, if the State's contention that the sale of heroin was made is accepted for the sake of argument, Shaw did, in fact, unlawfully co-operate, aid, abet and assist in the alleged sale. If the testimony of Shaw is to be believed it sustains Petitioner's contention that Shaw is, indeed, an accomplice. Shaw allegedly drove Brown and himself to the trailer to make the purchase, and allegedly purchased the drug for himself and help arrange the sale to Brown. Mr. Shaw testified as follows regarding the circumstances of the alleged sale of heroin:

> Q. 36. How did you go out there? Did you go in your car or Buck Brown's or walk or what?
>
> A. We were in my automobile. (T.R. p. 36)

Shaw allegedly made a purchase of two packages of heroin, one for himself and one for Brown and left his wrist watch as security for both purchases.

Q. 73. Did you agree to pay any money? Did you say a few minutes ago that you put your watch up and you would pay him later? Is that what you said?

A. Yes, sir.

Q. 74. What was the agreement as to the payment then?

A. I was to pay him $10.00 for the substance that I bought and $10.00 for the package Mr. Brown had. Mr. Brown asked me for a loan and I told him I didn't have any money so, therefore, put my watch up for both packages.

Q. 75. You stood for what Brown got and paid $10.00 for his and $10.00 for the other?

A. Yes, sir.

By his own testimony it appears Shaw certainly aided and abetted in the alleged sale of heroin to Buck Brown. In *United States v. Wilson* (D.C. Wash. 1932) 59 F. 2d 47, the Court held that persons who furnish material, ordinarily used for legal purposes, with knowledge that the material was to be used for the unlawful manufacture of liquor are guilty of aiding and abetting or conspiring to violate prohibition laws. In *Mays v. United States* (8th Cir. 1958), 261 F. 2d 662, the Court sets out this criteria: "In a prosecution for the unlawful sale of heroin the record disclosed sufficient evidence to support a finding of defendant's guilt as an aider and abettor inasmuch as it was shown that defendant associated himself with the sale of heroin and sought to bring about the sale."

This Honorable Court has stated the test to be applied in determining whether a person is an aider or abettor in *Nye & Neissen v. United States* (1949), 336 U.S. 613, 69 S. Ct. 766 at page 769:

> "In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about and that he seek by his action to make it succeed."

Shaw allegedly purchased the package of heroin for Brown and thus by his acts participated in the crime and insured its success.

A long line of Tennessee cases has held that the alleged victim in an incestuous relationship is an accomplice of the perpertator of the crime and her damning testimony requires corroboration to support a conviction. *Scott v. State* (1960), 207 Tenn. 151, 338 S.W. 2d 581, *Shelly v. State* (1895), 95 Tenn. 152, 31 S.W. 492, *Sherril v. State* (1959), 204 Tenn. 437, 321 S.W. 2d 811.

In analogy Shaw, the recipient of the substance in the alleged sale, is clearly an accomplice in accordance with the above well-established law.

Tennessee law is clear on the point that the testimony of an accomplice must be corroborated to sustain a conviction and that such a conviction based on the uncorroborated testimony of an accomplice is prejudicial error. *Kinchelow v. State* (1844), 24 Tenn. 9, 5 Hump. 1; *Robinson & Jones v. State* (1855), 84 Tenn. 146, 16 Lea 123; *Clapp v. State* (1895), 94 Tenn. 186, 30 S.W. 214; *Smartt et al. v. State* (1904), . . . S.W. 2d 452; *Ripley v. State* (1950), 189 Tenn. 681, 227 S.W. 2d 26; *Hicks v. State* (1912), 126 Tenn. 393, 88 S.W. 2d 452; *Moore v. State* (1968), 1 Tenn. Cr. App. 190, 432 S.W. 2d 684.

Tennessee's peculiar law created a class wherein Petitioner is protected. In his trial Petitioner was denied such protection

because he was, indeed, convicted upon the uncorroborated testimony of an accomplice.

Respondent argues in its Reply at page 7, "For the law to supply the necessary criminal intent when the border is passed would be against sound policy." Petitioner submits that it would be in vioaltion of sound policy and fundamental due process of law to clothe a municipal police officer with all of the rights and powers of his municipal post when he is five miles outside the jurisdictional limits of the municipality that employed him, without the approval of a proper law enforcement agent in that jurisdiction.

Petitioner prays that his Constitutional rights be upheld and that his Petition for Writ of Certiorari be granted and the conviction reversed.

Respectfully submitted

HENRY V. SUTTON
Attorney at Law
Suite 2904
100 North Main Building
Memphis, Tennessee 38103

and

KEMPER B. DURAND
Attorney at Law
Suite 1105
Union Planters Bank Building
Memphis, Tennessee 38103

Attorneys for Petitioner

Certificate of Service

I, Henry V. Sutton, one of Petitioner's attorneys, hereby certify that a copy of the foregoing Rebuttal to Reply of Respondent has been served via U. S. mail, postage prepaid, on the Attorney General of the State of Tennessee at his offices located in the Supreme Court Building, Suite 414, Nashville, Tennessee 37219, on this the 14th day of November, 1974.

Henry V. Sutton